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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

JACK TRIMBLE, AND JOE TRIMBLE, BY HIS NEXT FRIEND, JACK TRIMBLE,

Appellants,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

MOTION FOR LEAVE TO FILE STATEMENT AS TO JURISDICTION.

Come appellants and move the Court for leave to file the Jurisdictional Statement in the above case, because of a misunderstanding of the rules.

Respectfully submitted,

J. SMITH HAYS,
WILLIAM HAYS,
Attorneys for Appellants,
Winchester, Kentucky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

ANDREW JACKSON TRIMBLE (JACK TRIMBLE), JOE TRIMBLE, AN INFANT, BY HIS NEXT FRIEND, JACK TRIMBLE,

Appellants,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

STATEMENT AS TO JURISDICTION.

The jurisdiction of this Court is invoked under 237 (a) and (b) of the Judicial Code, as amended, Title 28, U. S. Code, Section 344 (a) and (b).

The Federal statutes involved on this appeal are:

a. Act of Congress of February 10, 1939, c. 2, 53 statutes 1.

b. U. S. Revised Statute, Section 3467, as Amended May 10, 1934.

The provisions pertinent to this case are:

Section 810 I. R. C. (26 U. S. C. A. 810):

Rate of tax.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net

estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title.
• • •

Section 822b I. R. C. (26 U. S. C. A. 822b):

(b) Liability for payment. The tax imposed by this subchapter shall be paid by the executor to the collector. 53 Stat. 127.

Section 825a I. R. C. (26 U. S. C. A. 825a):

Discharge of executor from personal liability.

(a) Application for discharge. If the executor makes written application to the Commissioner for determination of the amount of the tax and discharge from personal liability therefor, the Commissioner (as soon as possible, and in any event within one year after the making of such application, or, if the application is made before the return is filed, then within one year after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in section 874 and 875) shall notify the executor of the amount of the tax. The executor, upon payment of the amount of which he is notified, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

Section 826b I. R. C. (26 U. S. C. A. 826b):

(b) Reimbursement out of estate. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless

otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Section 826c I. R. C. (26 U. S. C. A. 826c):

(c) Liability of life insurance beneficiaries. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitld to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. 53 Stat. 127.

Section 827b I. R. C. (26 U. S. C. A. 827b):

(b) Upon property of transferee. If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee,

except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

TITLE 26—INTERNAL REVENUE.

Chapter I—Bureau of Internal Revenue.

Subchapter B—Part 81.

Regulation 105.

Sec. 81.75 Payment of tax; general.—The tax is due and must be paid within 15 months from the date of death unless an extension of time for payment thereof has been granted by the Commissioner. (See also section 81.79.) If the tax is due 15 months after the decedent's death, the due date is the day of the fifteenth calendar month after his death numerically corresponding to the day of the calendar month on which death occurred, except that, if there is no numerically corresponding day in such fifteenth month, the last day of such fifteenth month is the due date. For example, if the decedent died on August 31, 1939, the due date is November 30, 1940. * * * The collector will grant to the person paying the tax duplicate receipts, either of which will be sufficient evidence of such payment and entitle the executor to be credited with the amount by any court having jurisdiction to audit or settle his accounts.

* * * Until the tax, including any deficiency, is finally determined, the executor should reserve a sufficient portion of the estate to satisfy the liability.

Sec. 81.76 The executor shall pay the tax.—The Internal Revenue Code provides that the executor shall pay the tax. This duty applies to the entire tax, regardless of the fact that the gross estate consists in part of the property which will not come into his possession. If there is no duly qualified executor or administrator, all persons in actual or constructive possession of any property of the decedent are liable for and required to pay the tax to the extent of the value of such property. * * *

UNITED STATES REVISED STATUTES, Section 3467.

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the per-

son or estate for whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (R. S. sec. 3467, May 10, 1934, c. 277, sec. 518 (a) 48 Stat. 760.)

Judgment, Appealed From.

The judgment of the Pike Circuit Court is found in R. Vol. 1, p. 120.

The first opinion of the Court of Appeals of Kentucky, dated February 10, 1943, (whole court sitting) reversing the Pike Circuit Court in part, is not and will not be published in the Reporters, is found in R. Vol. 2, p. 135, and is attached as Exhibit A to this statement.

The second opinion of the Court of Appeals of Kentucky, dated June 25, 1943, affirming the Pike Circuit Court judgment, may be found in 173 S. W. (2d) 985, Vol. 8, S. W. Advance Sheets, of October 19, 1943, and R. Vol. 2, p. 153, and is Exhibit B to this statement. The minority dissenting opinion is at the end of the opinion of the Court of Appeals, Exhibit B, which became final October 5, 1943, by reason of the denial of petitioners' petition for rehearing on that date.

This appeal is prosecuted under Section 350 of Title 28 of the United States Code.

Nature of the Case, and Rulings Bringing the Case Within the Jurisdictional Provisions.

The petitioners, Andrew Jackson Trimble (sued in this case as Jack Trimble), and Joe Trimble (an infant over 14 years of age, by his next friend, Jack Trimble), state they are citizens and residents of Pike County, Kentucky; that James Hatcher died September 29, 1939, a citizen and resident of Pikeville, Pike County, Kentucky, having made

and published his will with codicils thereto; that James Hatcher's will with codicils, R. Vol. 1, p. 16, was, on October 2, 1939, filed, proven and probated by proper orders duly entered in the Pike County Court; that by the will and orders duly entered Zach Justice and K. L. Arnold were appointed, R. Vol. 1, p. 17, executed bond and qualified as Executors of James Hatcher; that by James Hatcher's will, Zach Justice and K. L. Arnold were appointed Trustees of his estate, R. Vol. p. 20, and by proper orders duly entered, they executed bond and qualified as such Trustees; that they then became, have been since, and now are the duly appointed, qualified and acting Executors and Trustees of the Estate of James Hatcher, deceased.

Petitioners state Zach Justice and K. L. Arnold were by proper orders of Pike Circuit Court, appointed, executed bond and qualified as provided by law as statutory guardians for the infant petitioner, Joe Trimble, and the infant respondents, Mary Margaret Trimble, May Trimble, and June Trimble; that they have been since and now are their duly appointed, qualified and acting statutory guardians; that Zach Justice and K. L. Arnold were appointed, executed bond and qualified as statutory guardians of petitioner, Jack Trimble, and respondent, Betty Trimble, who are each now 21 years of age.

Petitioners state by the will of James Hatcher, all of his property of every kind owned at the time of his death was conveyed to Zach Justice and K. L. Arnold, Trustees, R. Vol. 1, p. 20, to be held, managed and controlled for the use and benefit of the seven Trimble children and four Hatcher children (for life with remainder over): James Trimble, Jack Trimble, Betty Trimble, Joe Trimble, Mary Margaret Trimble, May Trimble and June Trimble, and Walter Hatcher, Jr., Betty Hatcher, Pem Hatcher, and Bruce Miller Hatcher.

Petitioners state James Hatcher within two years of his death conveyed to Jack and Joe Trimble his residence and hotel property in Pikeville, Kentucky, valued for estate tax purposes at $110,000, R. Vol. 1, p. 5.

Petitioners state the Treasury Department, Internal Revenue Service, assessed and fixed the gross value of the Estate of James Hatcher, deceased, for Federal estate taxes, to be $486,801.33, R. Vol. 1, p. 92, and the net estate for Federal estate tax to be $352,931.29, R. Vol. 1, p. 93, and the net estate for additional Federal tax to be $412,-931.29, R. Vol. 1, p. 93, and correctly computed the tax to be $61,036.60, R. Vol. 1, p. 94; that on March 17, 1941, the Executors paid the Collector of Internal Revenue $14,981.10, leaving a deficiency of $46,055.50, R. Vol. 1, pp. 6, 94. Petitioners say this assessment included for estate tax purposes the value of gifts made within two years of James Hatcher's death to petitioners, Jack and Joe Trimble, in the amount of $110,000 and to respondents money and property of the value of $63,176.00, making gifts, transfers, totalling $173,-176.00, R. Vol. 1, p. 5.

This action was instituted by the Executors and Trustees of James Hatcher in the Pike Circuit Court, Kentucky, July 18, 1942, under Kentucky statutes providing for a declaration of rights and a settlement of the controversies between the parties.

The Executors took the position that, by the payment by them of the Federal Estate taxes, they acquired the right to be reimbursed by donees receiving property from James Hatcher within two years of his death; that by such right they would be entitled to be reimbursed $14,823.51 from petitioners as their proportionate share of the estate taxes paid by the Executors, Vol. 1, pp. 3, 101, 103, 106.

Petitioners, Jack Trimble, and Joe Trimble, by his guardian ad litem, answered separately, R. Vol. 1, pp. 79-96, deny-

ing the right of the Executors or Trustees to recover any sum from them or either of them on account of Federal Estate taxes when paid and satisfied by the Executors; they affirmed they had no obligation to pay any of the Federal Estate taxes, and all their secondary liability would end when the taxes were paid by the Executors; that the Estate taxes assessed by the United States are a debt of the decedent; that it was so provided in effect by the Federal Statutes Internal Revenue Code, as amended (R. Vol. 1, pp. 81, 113).

Petitioners pled and contended that under the will of James Hatcher, deceased, it was provided the Executors should pay out of his estate passing to them at his death all Federal estate taxes; that there was no provision in his will imposing any liability on petitioners on account of the conveyance made to them; that James Hatcher could not burden the absolute gifts made to petitioners, by his will which took effect only at the time of his death.

Petitioners state that under the pleadings and issues there was drawn in question the construction of the provisions of James Hatcher's will relative to the payment of taxes under the Congressional acts and under Article 6 and the 14th Amendment to the Constitution of the United States. The pertinent provisions of James Hatcher's will relative to taxes are set forth in Exhibit C to this statement.

Petitioners state the adult respondents by their attorney and the infant respondents, by their guardian ad litem, answered (R. Vol. 1, p. 74,103) and pled in substance the Executors upon payment of the Federal Estate Taxes would acquire the right of contribution from petitioners.

Petitioners state they replied traversing the allegations contained in the answers of the adult and infant respondents, and the issues were completely joined in the Pike Circuit Court. R. Vol. 1, pp. 99-116.

Petitioners state James Hatcher by his deed of October 6, 1938, as alleged by the Executors and Trustees, conveyed to Jack and Joe Trimble the James Hatcher residence and hotel property, for life with remainder over (R. Vol. 1, p. 5); that, by this conveyance James Hatcher divested himself of all title to that property; that it was subject only to such secondary liability for the payment of Federal Estate taxes as is by the Federal statutes imposed, as security, for the payment of the Estate taxes assessed, if there is no estate or not enough thereof passing to the Executors to pay the Federal Estate taxes.

From these facts, it follows James Hatcher at his death had no right or title in or to any of the gifts made by him, and of necessity, had no power to impose any additional lien or debt or even reduce the secondary liability imposed by the Federal statutes, except, as provided by Federal statute, he might by his will direct the burden of the Federal Estate tax should be born by his devisees under his will, but not as to his donees. 826 B. I. R. C. (26 U. S. C. A. 826.)

Petitioners state James Hatcher's estate passing at death to his Executors and Trustees is amply able to pay the Federal Estate tax; R. Vol. 1, p. 117 that petitioners' liability for the payment of James Hatcher's Estate taxes becomes primary only in the event there is not sufficient estate in the hands of his Executors to pay the tax; that upon the payment of the tax by the Executors, petitioners' contingent secondary liability is extinguished.

Petitioners state the Pike Circuit Court adjudged the Executors were required by the Federal statutes to pay the Federal Estate tax and then erroneously adjudged (R. Vol. 1, p. 122) that, by such payment, the Executors acquired a right of reimbursement from petitioners jointly in the sum of $14,823.51; that by so adjudging the Pike Cir-

cuit Court failed to recognize the rights of petitioners under the Acts of Congress of February 10, 1939, c. 2, 56 Statutes 1, under Revised Statute, Section 3467, as Amended May 10, 1934, under Article 6 of the Constitution of the United States, and under the 14th Amendment, Section 1, of the Constitution of the United States; that by said judgment petitioners were deprived of their immunity to be free from the Federal Estate Taxes imposed against the estate of James Hatcher when said taxes were paid by the Executors from his estate in their hands; that the petitioners then contended they were immune from the Federal Estate taxes when so paid.

Petitioners state, by said Judgment, the Pike Circuit Court failed to recognize the State of Kentucky, by the act of its officers or any of them, had no power or authority to deprive petitioners of their property without due process of law; that by the judgment of the Pike Circuit Court petitioners have been deprived of their property of the value of $14,823.51, in violation of the 14th Amendment, Section 1, of the Constitution of the United States.

Petitioners state the judgment of the Pike Circuit Court failed to recognize the Federal statutes and decisions of the Supreme Court thereunder as the supreme law of the land, and deprived petitioners of their rights under Article 6 of the United States Constitution.

Petitioners state they excepted to the judgment of the Pike Circuit Court and prayed an appeal to the Court of Appeals of Kentucky, which was granted. Petitioners state the Court of Appeals of Kentucky is the highest court of law or equity in the Commonwealth of Kentucky; that the case was there briefed by petitioners and respondents on the issues, submitted and disposed of by the Court of Appeals on February 10, 1943, when the judgment of the Pike Circuit Court was reversed in so far as it provided for a contribution and in so far as it provided the Executors

were entitled to reimbursement from petitioners (Exhibit A with this statement); that on March 17, 1943, respondents filed petition for a rehearing and, on April 20, 1943, petitioners filed a response to the Executors' petition for rehearing, and the case was re-submitted. On June 25, 1943 the Court of Appeals of Kentucky withdrew the original opinion and delivered an opinion (Exhibit B with this statement) by the Court, divided four to three, affirming the judgment of the Pike Circuit Court; that on July 23, 1943 petitioner filed petition for rehearing, to which petition the Executors filed response. Petitioners' petition for a rehearing was overruled October 5, 1943, when the judgment became final and the mandate of the Court of Appeals of Kentucky was issued.

Petitioners state they argued in their briefs in the Court of Appeals, as they had done in the Pike Circuit Court; that the Court of Appeals of Kentucky failed to recognize the rights of petitioners under the Acts of Congress of February 10, 1939, c. 2, 53 Statutes 1, under revised Statutes, Section 3467, as amended May 10, 1934, under Article 6 of the United States Constitution, and the 14th Amendment, Section 1, of the United States Constitution, and erroneously held the Executors were subrogated to the right of the Sovereign and had the right to collect from petitioners a pro rata share of the Federal Estate taxes; that by such holding petitioners were deprived of their immunity from the payment of the tax, which was and is in violation of the 14th Amendment, Section 1; that there was erroneously imposed upon petitioners an obligation to pay $14,823.51, thereby depriving petitioners of their property without due process of law.

Petitioners state the Court of Appeals of Kentucky failed to recognize the Acts of Congress of February 10, 1939, c. 2, 53 Statutes 1, and Revised Statute, Section 3467, as amended May 10, 1934, and the opinions of the Supreme

Court construing said statutes were the supreme law of the land, and erroneously imposed upon petitioners an alleged rule of Equity in Kentucky in its place; that there is no Kentucky Statute or rule of Equity, nor could there be one in a suit like this, without violating the acts of Congress and the United States Constitution.

Petitioners state they contended under the Federal statutes, the issues in the pleading, and the provisions of James Hatcher's will, that James Hatcher imposed by his will the obligation, as he had a right to do, upon his Executors to pay all of his debts, Federal Estate taxes and other taxes; that the Court of Appeals erroneously failed to recognize the provisions of James Hatcher's will or to give effect to those provisions or to the Federal statutes, and erroneously adjudged James Hatcher's will contained no provision directing the payment of the Federal Estate taxes by his Executors.

Petitioners state Congress, by 826(c) I. R. C., (26 U. S. C. A. 826(c)) authorizing the Executors to collect proportionate share of the Federal Estate tax from the beneficiaries of life insurance includable in the gross estate, forbids further apportionment by the States against donees, as petitioners' property is not actually handled as a part of the Estate by the Executors; that Congress reserved to itself the right to determine what properties not passing through the hands of the Executors shall pay a proportionate part of the Federal Estate tax and, having entered this field, the States no longer can determine the impact of the tax in such cases.

Petitioners state they did, on December 4, 1943, apply to the Court of Appeals of Kentucky for an appeal to the Supreme Court of the United States, which was allowed by an order duly entered. R. Vol. 2, p. 211 and R. Vol. 4, p. 231.

Cases Believed to Sustain Jurisdiction.

The Federal Estate Tax is imposed upon the net estate, Sec. 810 I. R. C. The value of the gross estate is determined by including the value at death of all property real or personal, tangible or intangible to the extent of the interest of decedent at death. Sec. 811 I. R. C. By this provision the Federal Statute reaches across the dividing line of death into transactions consummated during decedent's life; i. e., gifts in contemplation of death. This has been done here and that question is at rest.

The estate tax is upon the right to transmit property. *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. Ed. 969. An interesting discussion of the right of the sovereign to tax, take a portion of an estate, for the granting of the right to dispose of property at death, see *U. S.* v. *Perkins*, 163 U. S. 625, 41 L. Ed. 287.

In *Y. M. C. A. et al. v. Davis et al.*, 264 U. S. 47, 68 L. Ed. 558, this Court says:

> "What was being imposed here was an excise upon the transfer of an estate upon the death of the owner. It was not a tax upon succession and receipt of benefits under the law, or the Will. It was death duties, as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devices succeeded on death, but the interest which ceased by reason of death."

In *Ithaca Trust Company* v. *U. S.*, 279 U. S. 151, 73 L. Ed. 647, the Court says:

> "The tax is on the act of the testator, not on the receipt of property by the legatees."

Again, in *U. S. Trust Company* v. *Helvering*, 307 U. S. 57, 59 Sup. Ct. Rep. 692, the Court says in discussing Estate Tax:

> "An estate tax is not levied upon the property of which an estate is composed. It is an excise imposed

upon the transfer of or shifting in relationships to property at death."

From these authorities it is clear the Federal Estate tax was and is an obligation of the decedent and in the absence of any testamentary direction should be paid by the executor to the collector.

The prevailing rule is: Where a decedent dies testate making no provision as to the incidence of the tax the residuary estate must bear the estate tax including the portion attributable to specific gifts.

This Court in *Y. M. C. A. et al.* v. *Davis et al., supra,* says:

> "It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor, if she chose. It must be presumed, when she failed to exercise the power, that she intended the incidence of the tax to be where otherwise by law it must be, and, therefore, that it was her purpose that her residuary legatees were to receive all that was left after paying all charges, including this tax, out of her estate. • • •
>
> The gifts are, and were intended by the testator to be, indefinite in amount, and to be what was left after paying funeral expenses, attorneys' fees, executor's compensation, debts of the decedent, and taxes. These donees do not pay the taxes any more than they pay the funeral expenses, the lawyers, the executors, and the testator's debts."

In *Central Trust Company* v. *Barrow,* 144 Kan. 79, 58 Pac. 2d 469, the will contained no direction relative to the payment of taxes. The Court held the recipients of gifts made in contemplation of death were not obligated to reimburse trustees for any portion of the Federal Estate tax assessed against the estate in the computation of which the gifts so made were included. This case is upon all four with the one at bar and disposes of every question.

The following cases and many others announce in substance the same rule:

U. S. v. *Woodward*, 256 U. S. 632, 65 L. Ed. 1131;
Plunkett v. *Old Colony Trust Company*, 233 Mass. 471, 124 N. E. 265;
Estate of Brown v. *Hoge*, 198 Iowa 373, 199 N. W. 320;
Taylor v. *Jones*, 242 Mass. 210, 136 N. E. 382;
Amoskeag Trust Company v. *Trustees of Dartmouth College*, 89 N. H. 341, 200 Atl. 786 (overruling prior opinions of that Court);
Matter of Hamlin, 226 N. Y. 407, 124 N. E. 4, cert. den. 250 U. S. 672;
Newton's Estate, 74 Pa. Super. 361.

Some Courts have considered the tax an administration expense for which the residuary estate is liable.

Estate of Brown v. *Hoge, supra;*
Ely's Estate, 28 Pa. D. & C. 663;
Hapburn v. *Winthrop*, 83 F. 2d 566.

(a) *Estate Tax is a Debt.*

By Sec. 3467, Revised Statute, as amended May 10, 1934, taxes are included within the term debts. This Section is copied on page 3, supra.

This Court in *Price* v. *U. S.*, decided in 1926, 269 U. S. 492, 70 L. Ed. 373, while considering a similar statute said:

> "The word 'debts' as used in Revised Statutes, Section 3466, * * * includes taxes."

Again in *Hatch* v. *Morosco Holding Company, Inc.*, 61 Fed. Sec. 944, decided in 1932, it is said:

> "The statute applies to taxes, since they are embraced within the term 'debts', Price v. U. S., supra."

The Court of Appeals of Kentucky in the recent opinion of *Breete, et al.*, v. *Hill, et al.*, 293 Kentucky 526, 169

S. W. 2d 632, declared taxes to be debts. Item I of James Hatcher's will provides for the payment of his debts. Exhibit "C" with this statement.

(b) *Equity.*

Equity requires the executors to show a right in themselves to recover from petitioners this tax, or an obligation on petitioners to repay them the tax. The executors have not shown and cannot show a right to recover from petitioners as the Congressional Act Sec. 826b, I. R. C. provides petitioners may recover from them. In such a case there can be no equity compelling petitioners to pay.

There is no Legislative Act in Kentucky making any provision for the payment of Federal Estate taxes by donees and as counsel view it there cannot be one in instances such as the present case so long as Sec. 826b, I. R. C. remains in force.

Upon the question of equity Justice Holmes in discussing the Federal Estate tax said:

> "The inequalities charged upon the statute, if there is intestacy, are all inequalities in the amounts that beneficiaries might receive in case of estates of different values, of different proportions between real and personal estate, and of different numbers of recipients; or, if there is a will, affect legatees. As to the inequalities in the case of a will, they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes. As to intestate successors, the tax is not imposed on them, but precedes them; and the fact that they may receive less or different sums because of the statute does not concern the United States." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 41 S. Ct. 506, 65 L. Ed. 963.

The Federal Statutes give the testator the right to direct what property or class of property shall bear the burden of the tax. Appellants contend James Hatcher's will did

actually place the burden upon his estate to be paid by his executors. Most certainly there is no direction in his will charging petitioners with any part of his estate taxes.

As the Federal Estate tax arises by reason of death and is a tax upon the transmission of property at the time of death from the decedent to the living, it must be payable from the estate which actually passes to the executors.

If the Federal Estate tax is paid by the executors, and it must be, under the judgment appealed from, it will be taken from the property actually passing at death to the executors before the remaining property goes into the trust fund created by the decedent's will, and in effect the tax will be paid by the eleven devisees of the trust estate equally, share and share alike. This is equitable as well as legal, as the rights are equal and the burden will be borne equally.

This tax is taken from the estate before the property is set off to the beneficiaries. It is, therefore, not a payment as to which the beneficiaries have any concern. It is not a charge against legatees or distributees or donees.

It is fundamental that the benefaction conferred by a residuary clause of a will is only that which remains after all paramount claims upon the estate of the testator have been satisfied.

In *Plunkett* v. *Old Colony Trust Company*, 233 Mass. 471, 124 N. E. 265, the Court says:

> "The sections of the act prefaced by this heading or title refer exclusively to the value of the 'net estate' as the basis for the ascertainment of the tax. There is no mention whatever in this connection of legacies, devises or distributive shares. They are wholly omitted. The statute ignores utterly the disposition made of the estate by the testator or by the law as to intestate property, and looks only to the net estate itself as defined.

"The words of the act of Congress imposing the tax point strongly toward the interpretation that the tax is on the estate and not on the particular devises, legacies or distributive shares. The words 'net estate' are used uniformly in the operative parts of the act to the exclusion of phrases of other significance.

"It is a general rule that, failing any testamentary provision to the contrary, debts, charges and all just obligations upon an estate must be paid out of the residue of an estate. The benefaction conferred by the residuary clause of a will is only of that which remains after all paramount claims upon the estate of the testator are satisfied." • • • "The tax is a pecuniary burden or imposition laid upon the estate." • • • "In its nature it is superior to the claims of the residuary legatee. Since neither the act of Congress not the will and codicils made any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate."

In *Taylor* v. *Jones et al.*, 210 Mass., 136 N. E. 382, the executor paid the Federal Estate tax and deducted a pro rata share of that tax from a specific bequest. The legatee brought suit to recover the amount of the tax deducted from her legacy. The Court held she was entitled to recover from the executor. This Court denied certiorari in this case in 260 U. S. 742, 67 L. Ed. 481, thereby in effect affirming the State Court decision.

In *Turner* v. *Cole*, 118 New Jersey Eq. 497, 179 Atlantic 115, it was held in the absence of a direction in the will or by a statute, the Federal Estate tax was payable from the estate before distribution and the burden of it could not be placed upon the beneficiary.

It seems *Bemis et al.* v. *Converse et al.*, 246 Mass. 131, 140 N. E. 686, disposes of the alleged rule of equity, when that Court says:

"Courts can not speculate concerning the intention of settlors and testators as to where they intend the

burden of taxes to rest. The instrument as written must govern. Opportunity is freely open in framing trust deeds and wills to make full and accurate expression of desire and intention respecting the payment of taxes and the particular beneficiaries whose shares shall be exonerated from or bear that pecuniary exaction for the support of government. Specific provision on this point is familiar in wills and is not infrequently found in other instruments. In the absence of a definite declaration on the subject it must be presumed that the intention was that the ultimate weight of taxation must rest where the law places it. It can not be presumed that anything else was intended than what is stated in the written instrument. It may be, for aught that now can be known, that the precise result which has happened was intended. There is no jurisdiction in equity to prescribe what may seem fairer than the settlor or testator has declared. To do that is as foreign to chancery principles as to remold a will in order to make it conform to different conceptions of justice or fairness from those indulged by the testator. 'Where no other provision is made taxes must be paid out of the residue of the estate' ".

Can it be argued successfully that James Hatcher did not know what he intended when he gave this property to petitioners, and that his gift shall now be reduced by more than $14,000? Is this equity?

This Court in *Y. M. C. A. et al.* v. *Davis et al.*, supra, says:

> "It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor if she chose. It must be presumed, when she failed to exercise the power, that she intended the incidence of the tax to be where otherwise by law it must be, and therefore, that it was her purpose that her residuary legatees were to receive all that was left after paying all charges, including this tax, out of her estate."

As the Court of Appeals of Kentucky by its first opinion, Exhibit A with this statement, states there is no Kentucky State Statute directing how the tax shall be apportioned and by its second opinion, Exhibit B with this statement, takes the position the will does not direct the payment of the estate taxes. This brings us back to a correct construction of the Federal Estate tax act to determine this case.

(C) *The Congressional Act.*

Section 822b, Title 26 U. S. C. A., page 2, supra, provides the tax imposed shall be paid by the executor to the collector, and Section 826b, Title 26 U.S.C.A., page 2, supra, provides for reimbursement out of the estate.

The judgment appealed from is directly in contradiction to the provisions of Sec. 826b and erroneously imposes a primary personal liability on petitioners to contribute a pro rata part of the estate tax to the executors after the executors have paid the tax in discharge of their obligation.

This Court in *Riggs* v. *Del Drago et al.*, 63 S. Ct. 109, says:

> "We are of the opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property AT DEATH should govern the distribution of the REMAINDER and the ultimate impact of the federal tax;" • • • "This conclusion is based upon the provisions of the Revenue Act of 1916," • • • "and subsequent acts, their legislative history and their administrative interpretation.
>
> "As pointed out before, while the federal statute normally contemplates payment of the tax before the the estate is distributed," • • • (by) "Sec. 822 (b), provision is made for collection of the tax if distribution should precede payment." • • • "If any distributee is thus called upon to pay the tax, Sec. 826 (b) provides that such person 'shall be entitled to re-

imbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate.' By that section Congress intended to protect a distributee against bearing a greater burden of the tax than he would have sustained had the tax been carved out of the estate prior to distribution; any doubt that this is the proper construction is removed by the concluding clause of the section specifically stating that it is 'the purpose and intent of this sub-chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.'" • • •

"In short, Sec. 826 (b), especially when cast in the background of Congressional intent discussed before, simply provides that, if the tax must be collected after distribution, the final impact of the tax shall be the same as though it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be.

"Respondents also rely on Sec. 826 (c)," • • • "826 (d)," • • • "as forbidding further apportionment by force of state law against other distributees. But these sections deal with property which does not pass through the executor's hands and the Congressional direction with regard to such property is wholly compatible with the intent to leave the determination of the burden of the estate tax to state law as to properties actually handled as part of the estate by the executor."

See:

Bemis v. *Converse*, 246 Mass. 131, 140 N. E. 686.

Farmers Loan & Trust Co. v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769.

Beyond doubt Congress intended the States should have the right to control the ultimate thrust of the tax in so far

as the property actually passes through the hands of the executors. In other words, the laws of descent and distribution of the various states should apply to estates the same as if there was no Federal Estate tax, in those instances where the property actually passes through the hands of the executors.

This is not the case involved, for here we have property, the title to which passed from James Hatcher during his lifetime and can never actually pass through the hands of his executors and did not pass at his death to his executors. In this field, Congress has legislated. Life insurance and powers of appointment are instances where Congress directs the donee shall contribute to the payment of the tax. These Congressional provisions by implication exclude all other classes of donees, of which petitioners are one, and who in addition are by Sec. 826 (b) vested with the right to recover any estate tax paid by them. Congress having invaded the field where the property does not actually pass through the hands of the executors, the States no longer have the right to require contribution in such cases.

The Congressional Act vests a right in donees, receiving property or money from the decedent before his death, to sue and recover from the estate in the hands of the executor, or from the estate that has passed through the hands of the executor, or by equitable recovery against persons receiving portions of the estate which has passed through the hands of the executor, to reimburse them for any payment of the tax imposed upon their gifts.

Congress did not overlook the fact donees who received title to property from the decedent before his death were not primarily personally obligated to pay, nor was their gift, the rem, primarily obligated to pay any of the estate tax of the decedent; its language is:

"• • • it being the purpose and intent of this subchapter that so far as is practicable and unless other-

wise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

Chief Justice Cardozo delivered the opinion of the Court of Appeals of New York in the case of *In Re Oakes*, 248 N. Y. 280, 162 N. E. 79. This opinion construes Sec. 826b, Title 26 U. S. C. A. Judge Cardozo states the question:

> "The question to be determined here is the incidence of the Federal tax as between the donee of the shares, who was also the executor, upon the one hand, and the legatees of the residuary estate, upon the other."

The Court then says:

> "The Federal tax, on the contrary, is laid upon the transfer of the estate as a whole, and, primarily at least, is a charge upon the residue.
>
> "What is taxed is 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of death.'
>
> "He (the executor) paid out of the residuary estate the tax due upon the transfer of the shares under the revenue act of Congress.
>
> "There can be no doubt that the executor was justified in discharging the tax out of the residue unless the incidence of the burden has been changed by the condition of the escrow.
>
> "The command of the statute is explicit as to the incidence of the burden" (The Court here quotes 826 b).
>
> "The incidence of the burden thus fixed by statute in terms so unmistakable has not been modified by the will."

Where the decedent dies testate, but makes no provision with respect to the incidence of the tax, the residuary estate must bear the entire tax, including the portion attributable to specific gifts.

Estate of Brown v. *Hoge*, 198 Iowa 373, 199 N. W. 320.
Lakes v. *Lakes's Exer.*, 267 Ky. 684, 103 S. W. 2d 86.

Plunkett v. *Old Colony Trust Co.*, 233 Mass. 471, 124 N. E. 265.

Taylor v. *Jones*, 242 Mass. 210, 136 N. E. 382, cert. den. 260 U. S. 742.

Woodruff v. *Holmes*, 328 Mo. 143, 40 S. W. 2d 616.

Amoskeag Trust Co. v. *Trustees of Dartmouth College*, 89 N. H. 471, 200 Atl. 786.

Matter of Hamlin, 226 N. Y. 407, 124 N. E. 4, cert. den. 250 U. S. 672.

Petitioners state until this Court directly passes on the questions here presented, it will be doubtful and many controversies will arise, under like or similar situations, seriously affecting the proper administration of estates in the United States. Reference is made to the petition for an appeal filed in this cause and to the assignment of errors, R. Vol. 2, pp. 168, 174, and same are made a part hereof.

We urge this Court to note jurisdiction of this cause for final hearing because the Courts below disposed of important and substantial Federal questions in a way that is in conflict with the Federal Statutes, decisions of this Court, and the Constitution of the United States.

Respectfully submitted,

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EXHIBIT "A".

COURT OF APPEALS OF KENTUCKY, FEBRUARY 16, 1943.

JACK TRIMBLE, et al., *Appellants*,

v.

HATCHER'S EXECUTORS, *Appellees*.

Appeal from Pike Circuit Court, Hon. Monroe Fields, Judge.

Opinion of the Court by Commissioner Morris — Affirmed in Part / Reversed in Part

James Hatcher died September 29, 1939; by his will executed October 10, 1938, appellees here, plaintiffs below, were named joint executors of and trustees under the will. The matters discussed arose in a suit for declaration of duties of the fiduciaries as to allocation of taxes against properties conveyed prior to Mr. Hatcher's death, and of a created trust fund.

The federal taxing authorities found the following transfers to be in contemplation of death; On October 6, 1938, Mr. Hatcher conveyed to Jack and Joe Trimble hotel property in Pikeville, valued at $110,000; to Betty Hatcher the Vanover Apartments, value $5,000; to Mary, Betty and May Trimble Locust Court in Pikeville, value $35,200, and on January 17, 1938, to Walter, Betty, Bruce and Pem Hatcher the Caney Creek farm, value $676; January 18, 1939 he made cash gifts to Mary, June, May and Betty Trimble, $4500 each, and on February 10, 1939 to June Polly (not of kin) $4500, a total of $173,176.00. The trust property was valued for tax purposes at $414,000; the total for taxation, after deductions and exemptions, was $412,941.29 upon which the tax was $61,036.60, a portion of which has been paid.

Plaintiffs asked the court to determine from a construction of the will whether or not they should demand a proportionate share of the estates taxes on the values of inter

vivos gifts, admittedly properly levied in contemplation of death, as fixed by federal authorities for purposes of taxation. It was agreed that it was their duty to pay all taxes. Two other questions were submitted, one as to whether or not recipients of the inter vivos gifts, by filing pleadings raising only the question of proper distribution of the tax, stood in danger of forfeiting rights to take under the will, the other as to the right of the representatives to mortgage the trust properties for the purpose of paying the taxes, it being shown that they had no funds to pay a balance of $46,000 on the estate taxes.

Testator in his fifty-eight page will, an exceedingly unique and interesting document, provided that if any devisee or beneficiary who contested the will should receive nothing. The chancellor held the proceeding not to be a contest or effort to challenge any portion of the will, but merely an effort on the part of interested parties to assist the court in determining as to who should ultimately bear the burden of taxes.

Here the suit was instituted by the personal representatives. There had been no objection on the part of any one of them to the probate of the will, nor in the instant proceeding to change or alter any provisions of the will insofar as it undertook to dispose of testator's properties. Authority for sustaining the holding may be found in South Norwalk Trust Co. *v.* St. John, 92 Conn. 168, 101 A. 963; Black *v.* Herring, 79 Md. 146, 28 A. 1063; Mallet *v.* Smith, 68 L. R. A. 447, In re Estate of Andrew Bergland, 5 A. L. R. 1363.

The provision of the will giving the representatives the power to mortgage the trust property for the purpose of paying certain taxes is contained in the will copied infra. The court properly construed the item to give them power to encumber the trust estate for the purposes indicated. The clause speaks for itself. Gaither *v.* Gaither, 288 Ky. 145, 155 S. W. (2) 746.

The other question calls for a construction of several clauses of the will relating to the payment of taxes. After the usual and customary declarations, testator provided that trustees should "pay all my just debts out of the trust

funds coming into their hands as soon after my death as possible." The general trust was created by item No. 8 of the will, which after specific devises and bequests willed to the trustees all undisposed properties for the benefit of great nieces and nephews, and one nephew. We quote pertinent items:

> "I hereby authorize my trustees when necessary, to borrow money and to mortgage my trust estate therefor for the sole purpose of paying the United States Government, County and State, including income and inheritance taxes levied or assessed against my said estate, whether such taxes be against my trust estate or other estate left by me by this will."

Included in item 8 of the body of the will was the following provision, the property mentioned being lands deeded by testator three years prior to his death:

> "I hereby * * * direct that out of the income from the trust property that trustees pay all taxes on all the property I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes deed by me to the Trimble children, and the Hatcher children, on Ivey and Caney Creek, and this shall continue throughout the existence of the ten year trust only. The taxes mentioned in this paragraph shall be paid without charging any of the trust property."

In a codicil of November 1938, testator wrote:

> "In the last paragraph at the bottom of page 12 of my said will I have provided for the payment of taxes on all the property I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes on property deeded by me to the Trimble children and Hatcher children on Ivey and Caney Creeks, etc. I hereby revoke the whole of said paragraph of my said will and in lieu thereof I make the following provision * * * for the payment of taxes:

"I hereby further authorize, empower and direct that out of the income from the trust property that the trustees pay all taxes on all the property which I may own at the time of my death, whether the same be part of this trust estate or not, also to pay all taxes on that property deeded by me to the Trimble and the Hatcher children on Ivy and Caney Creeks, alone, and when and if there are sufficient funds in my general trust fund with which to make such payment of said taxes. But when and if there is no money available out of my general trust fund for such payment, then I hereby authorize my trustees to make such payment of such taxes for the Ivy and Caney tracts out of the separate trust estate or separate trust funds held by my trustees for my devisees as set forth on page 15 of my said will. If such payment is made out of my own general trust fund such payment shall be charged against the devisee for who such payment is made. And if no funds are available out of either of my general trust fund or out of the separate trust funds held by my trustees for the devisees then such payment or any balance on said taxes shall be made by each devisee who owe such taxes."

The chancellor reserved, as we must do under the judgment all questions as to allocation of tax payments, save the one of federal estate tax. On this the court adjudged that it was testator's intention to provide for the payment of estate taxes out of the trust fund as against the property disposed of under his will; that he did not intend that the trust should be charged with gift taxes, and that while the executors were primarily liable for payment, they were to have pro rata contribution from those receiving gifts. He found the total net estate subject to estate tax, and the tax to be as above stated, 13.47 per cent of the taxable estate, and adjudged that each gift beneficiary should contribute the percentage on the fixed value of the gifts received.

From this part of the judgment the two Trimble boys, who were given the hotel property, have appealed. The personal representatives cross appeal, and while saying that

they are concerned only for their own protection in carrying out the provisions of the will, in brief counsel takes the position chancellor's judgment was correct, basing their conclusions, as do some appellees, on Hampton's Admr. v. Hampton, 188 Ky. 199, 221 S. W. 496; Martin v. Martin, 283 Ky. 513, 142 S. W. (2) 164, and on the further contention that a construction of the will in respect of payment of estate taxes leads to the conclusion that while such as were to be paid from the trust or income from the trust, it related only to property "left by the will or owned by testator at the time of his death."

The rule is that the federal estate tax is to be paid out of the estate as a whole, and there is no argument against this conclusion. The rule is also that applicable state law as to the devolution of property after death governs the distribution of the remainder, "and the ultimate impact of the federal tax," the federal government not being interested in the distribution of the estate after payment of tax. Riggs, Jr. v. Del Drago, —— U. S. ——, 87 L. Ed. 69. In this case the court was dealing with the effect of a New York statute, which made specific provisions that the federal estate taxes (except as otherwise provided in testator's will) should be spread proportionately among the distributees or beneficiaries of the estate. We have no such statute.

As we read the many cases cited, including Amoskeag Trust Co. v. Dartmouth College, 117 A. L. R. 1191, while the general rule seems to be that the estate tax is a debt against an estate, it is clear that the rule gives way to a state statute dealing with the subject (as in New York) or to the terms or provisions of the will, if there be clear implication that the taxes should fall on the residuary estate, rather than on any particular set of beneficiaries or legatees. And since we have concluded that by clear implication the testator intended that payment of the federal estate tax should rest on the trust property, it is unnecessary to discuss the vigorously argued and plausible proposition that the tax is such a debt against the estate, as should be under the first provision of the will, treated as other debts or claims.

This makes it unnecessary to make further reference to the Martin and Hampton cases, in both of which it appeared that decedents died intestate, nor to discuss the Lakes case, where the will made no reference to payment of any taxes. (Lakes v. Lakes' Exor., 267 Ky. 684, 103 S. W. (2) 85).

The provision in the initial clause referred to "my debts," being debts which he owed at the time of his death, and not to taxes, which matter he frequently mentioned in other parts of his will. As noted above, he authorized the representatives to mortgage the trust property for the *sole* purpose of paying "United States Government, * * * including income and inheritance taxes levied or assessed against my said estate left by me by this will."

There is a clear implication that the trust property should furnish funds to the payment of Government taxes, and a specific provision for mortgaging the property, "when necessary." It may be assumed that testator knew that taxes were to be paid, yet he clearly undertook by his will to place this burden of taxation upon the trust property. The only question here is whether or not the will shows clearly or by implication that it should bear all federal estate taxes.

There is nothing in the entire will to indicate an intention that the recipients of the gifts should bear any part of the burden of that tax, unless it be in the use of the words, "left by me by this will," or "owned by me at death." Construction of other provisions of his will indicate that he treated the gifts as being part of the estate left by his will, which in law, at least, for the purpose of the federal tax is true.

In one clause testator provided that the trustees should settle twice each year for the first ten years, such settlement to be made after payment of all taxes and other charges, the remainder to be equally divided among the eleven named beneficiaries of the trust. In another clause he expressly provided that if the income from his trust estate, after a named period, should be insufficient to pay taxes and necessary expenses, "and at the same time leave a substantial sum out of which to pay the devisees a fair

and distributable share after the payment of taxes," the beneficiaries might, after a certain period, petition for a discontinuance of the thirty-five year trust, indicating (for purpose of construction only) that beneficiaries of the trust should be relieved of tax payments, apparently of all nature. No reason is shown why it was intended that one set should be relieved of taxes, and the other burdened.

It is argued as being contrary to the position taken by some of the parties that in the codicil quoted above it was made obvious that the testator wanted it understood that the trustees should pay taxes only on the property conveyed more than two years before his death to the Trimble and Hatcher children on Caney and Ivy Creeks, these not being included in the trust or the inter vivos gifts.

From a reading of the codicil it may be gathered that what testator had in mind was that as to these particular properties, unless special provision be made, might have to bear taxes, the payment of which was not contemplated in other portions of his will. In this item the testator empowered the trustees to pay out of the income from the trust property all taxes on all of the property "I may own at the time of my death, whether the same be a part of this trust estate or not." He then proceeds to say "also to pay taxes on the property deeded to the Trimble and Hatcher children, alone, when and if there are sufficient funds in my general trust funds with which to make payment of such taxes." The word "alone" from a reading of the context, undoubtedly was intended to mean "only."

He continued by providing that if no general trust funds be available trustees might resort to the special trust fund, indicating that the trusts should bear these taxes. Here appears the only part of the entire will directing that any devisee or beneficiary of gift property should bear any sort of tax. He provided that if "such payment," (without doubt referring to the taxes on the gifts to the Hatcher and Trimble children) is made out of the general or special trust, it should be charged against the devisee or devisees for whom such payment was made.

Here the testator, while dealing with property conveyed more than three years prior to his death, treated the re-

cipients as devisees. It may be conceived that this provision refers alone to future ad valorem or income taxes, yet the language indicates the desire to have all taxes to be borne by the trust, including that on the two pieces of real estate, not inter vivos or in the trust. From this clause it may also be gathered that testator had in mind that in the future, in the administration of the trust, "if and when the income is insufficient," there should be an allocation of taxes against certain devisees. "Testator knew that when he wrote his will his estate, and the income therefrom, was more than sufficient to pay all taxes," particularly succession," and it was apparent from the record that aside from specific bequests the residue of his property was embodied in the trust, which is solvent.

There are other provisions of the will in which it was indicated that the recipients of the inter vivos gifts should receive these properties without the burden of taxes; the farm devised to the Trimble boys; the direction to purchase certain property for the Trimble girls, not to be treated as an advancement; other trust provisions for education to be treated likewise. In fact, except in the one instance above noted, in every item of the will when payments of taxes are to be made they are to come from the trust property or its income.

We do not place the same emphasis as do complainants on the words, "I may own at my death," or "property devised by me by my will." It is said in briefs, and we agree, that testator was a highly intelligent and shrewd business man, skillful in business and trading. That he maintained his clear mental faculties up to the time of his death, and it was also well known that because of his advanced age the federal authorities would include as a part of his taxable estate the property which he had given to donees before his death.

If he knew these things he knew that these gifts would be taxed as a part of his gross estate; that this method of distribution (in contemplation of death) was merely a substitute for testamentary disposition, and knowing this he provided for "Government" taxes to be paid, as all other taxes, except in the one instance by and from the trust property

or its income, with language indicating that there should be no contributions.

Having this view of the meaning of testator's will, it follows that insofar as the only debated question before us is concerned, the allocation of the federal estate tax, the judgment should be reversed to the extent it adjudged contribution. In other respects it is affirmed. Since this is primarily a suit for advice to the fiduciaries, the costs should be paid out of funds in their hands.

Affirmed in part; reversed in part. The whole court sitting.

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VB.
IM.

EXHIBIT "B".

COURT OF APPEALS OF KENTUCKY.

June 25, 1943

JACK TRIMBLE, et al., *Appellants*,

v.

HATCHER'S EXECUTORS, *Appellees*.

Appeal from Pike Circuit Court

Hon. Monroe Fields, Judge.

Opinion of the Court by Commissioner Morris Affirming.

James Hatcher died September 29, 1939, his will was executed October 10, 1938. The matters discussed arose in a suit for declaration of rights and duties of executors and trustees as to allocation of federal estate taxes. Within two years prior to his death Mr. Hatcher conveyed to his great nephews Jack and Joe Trimble the Hatcher Hotel in Pikeville, valued (for tax purposes) at $110,000; to Betty Hatcher the Vanover apartments, $5,000; to four Trimble girls, Locust Court, $35,000; to four Hatcher children, Caney Creek farm, $676.00. He made cash gifts to the Trimble girls, $4500 each, a like sum to June Polly, not of kin.

The taxing authorities found all these to have been made in contemplation of death. The total was fixed by taxing authorities at $173,176, and the value of property passing by will, real estate, notes, cash, insurance, etc., at $313,625.33; after exemptions and deductions the net taxable estate was fixed at $412,931.29, upon which the tax was $61,236.60; $14,764.19 has been paid, leaving the unpaid balance $46,055.00.

Appellees asserting lack of funds to pay the balance asked advice as to whether or not they should collect a proportionate part of the federal estate tax from the beneficiaries of the gifts, admittedly made in contemplation of death. Two other questions are raised: Whether any bene-

ficiary contesting the apportionment of taxes as sought, stands in danger of forfeiting rights to take under the will, and as to the right of trustees to mortgage the trust property for payment of taxes. Testator had written that any devisee or beneficiary who contested the will should take nothing under the trusts. The chancellor correctly held the proceeding to be only an effort of parties to assist the court in determining the tax burden. South Norwalk Trust Co. *v.* St. John, 92 Conn. 168, 101 A. 963; Black *v.* Herring, 79 Md. 146, 28 A. 1063; Mallet *v.* Smith, 68 L. R. S. 447; Estate of Andrew Bergland, 5 A. L. R. 1363. The provision authorizing the pledging of property is copied infra. The court construed this item when read with the whole will to authorize representatives to mortgage the trust property for payment of estate taxes chargeable against the property devised by this will. As to power see Gaither *v.* Gaither, 288 Ky. 145, 155 S. W. (2) 746.

After the customary declarations testator provided that the executors "pay all my just debts out of the trust funds coming into their hands." The two trusts were created by item 8 of the will, which after small specific devises and bequests, gave to trustees the residue for the benefit of great nieces and nephews, and one nephew. The will provided:

> "I hereby authorize my trustees when necessary to borrow money and to mortgage my trust estate therefor for the sole purpose of paying the United States government, county and state, including income and inheritance taxes levied or assessed against my said estate, whether such taxes be against my trust estate or other estate left by me by this will."

In a codicil of November 1938, which modified a portion of clause 8, relating to the same subject, testator wrote:

> "I hereby authorize, empower and direct that out of the *income* from the trust property the trustees pay all taxes on all the property *which I may own at the time of my death*, whether the same be part of this trust estate or not, also to pay all taxes on that property deeded by me to the Trimble and Hatcher children on Ivy and

Caney Creeks, alone, when and if there are sufficient funds in my general trust fund with which to make such payment of said taxes. But when and if there is no money available out of my general trust fund for such payment, then I hereby authorize my trustees to make such payment of such taxes for the Ivy and Caney tracts out of the separate trust estate or separate trust funds held by my trustees for my devisees as set forth on page 15 of my said will. If such payment is made out of my own general trust fund such payment shall be charged against the devisee for whom such payment is made. And if no funds are available out of either of my general trust fund, or out of the separate fund held by my trustees for the devisees, then such payment or any balance on said taxes shall be made by each devisee who owe such taxes."

The chancellor reserved, as we do, questions as to allocation of tax payments, except federal estate tax. The court concluded it was not testator's intention to provide for payment of estate taxes on the inter vivos transfers. That while the executors were primarily liable for payment they were to have pro rata contribution. He found the total tax to be 13.67 per cent of the taxable estate, and adjudged that each recipient of gifts, and those taking under the trust, should pay their proportionate part, based on the percentages.

Appellees, concerned chiefly for their protection, take the position as do some beneficiaries under the trust, that the judgment is correct, basing their conclusions on Hampton's Admr. *v.* Hampton, 188 Ky. 199, 221 S. E. 496; Martin *v.* Martin, 283 Ky. 513, 142 S. W. (2d) 164, further insisting that a construction of the will in respect of tax payments leads to the conclusion reached by the chancellor. The gift recipients contend that the will shows the intention of the testator to be that the federal tax should be paid from the trust property, the residuary estate, and if not so, then under the federal law, as construed, the tax must fall as other debts against the estate, payable as such under our laws of descent and distribution.

It is unnecessary to go into great detail in discussing arguments of the diverse claimants as to the meaning of the will with reference to taxes. The one class contends that by the clause of the will first above quoted, the testator meant that all taxes, including estate taxes, should be paid from the trusts. As against this contention it is argued that if it be conceded that the federal taxes should be paid from the trusts, the clause limited payment to taxes levied against "my trust estate or other estate left by me by this will."

It is also contended that the codicil, supra, showed an intention on the part of testator to have executors pay all taxes from the trusts. It may be noted that this portion of the will, if it is susceptible to the construction contended for by appellants, provided for tax payments, not out of trust funds, but out of the "income from the trust property." It also limits payment in this manner of taxes on property which "I may own at the time of my death." The reference to payment of taxes on the gift to the Hatcher and Trimble children (the Caney Creek farm) in connection with the provision for payment of all taxes from "income" clearly evinces the purpose of payment of ad valorem, and not estate taxes, which the testator no doubt knew would have to be paid promptly.

It is also argued in attempt to show that the intention was that all taxes should be borne by the trust, that testator highly favored those to whom he had made inter vivos gifts, many of whom were beneficiaries of the trusts. In answer to this it is argued that testator showed more concern as to future interest of beneficiaries of the trust. From a reading of the entire will testator was apparently much concerned in the use and protection of all properties and income coming to the hands of beneficiaries.

We do not take these arguments to be conclusive as bearing on the question of the ultimate burden, and must agree with the chancellor that the will did not evince an intention that the trust should bear the estate taxes on gifts made in contemplation of death. As to whether the will manifested intention that the trust beneficiaries should bear their proportions, need not be discussed since there is no com-

plaint from them, and the application of the law in any event would place proportionate burden upon them.

It is recognized at the outset that the opinions of many courts, and relied upon by gift recipients, hold that in the absence of a state statute or provisions of the will providing allocation otherwise, the ultimate burden of federal estate tax falls and remains where the federal statute, as claimed places it, upon the estate, or as some of the opinions hold, upon the residue. Among these cases are *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 68 L. Ed. 558; *Amoskeag Trust Co.* v. *Dartmouth College,* 89 N. H. 471, 200 At. 786; Re Hamlin, 226 N. Y. 407, 124 N. E. 4; *Lakes* v. *Lakes,* 267 Ky. 684, 103 S. W. (2) 86; *Central Trust Co.* v. *Burrow,* 144 Kan. 79, 58 p. (2) 469, and other cited.

For reasons later noted we need not go into a closer analysis of these cases. However, we cannot refrain from observing that in the recent case of *Riggs* v. *Del Drago,* U. S. 87, L. Ed. 69, 142 A. L. R. 1131, the Supreme Court apparently dispelled the notion that the federal taxing law should be construed as placing the tax estate on the residue of the estate. The commentator of the Del Drago opinion appropriately suggests that the ruling in *Y. M. C. A.* v. *Amoskeag,* and other cases cited, is dictum, since the question of final trust of the taxes was not a matter before the court. In the *Del Drago* case the question before the court was the constitutionality of a New York statute which provided a spread of the estate taxes proportionately among distributees or beneficiaries as a whole, in the absence of a contrary provision in the will, a most equitable rule, and one exemplified by this Court in opinions which have controlling bearing on the question here presented, to-wit: The *Martin* and *Hampton* cases, supra, with which to the extent the *Lakes'* case holds otherwise, conflict.

In the *Hampton* case the decedent had died intestate. Under this our laws of descent one-half of the personal estate passed to the widow, with dower in the real estate. The estate there consisted of personalty and real estate, which latter was sold prior to distribution. The administrator contended that the federal tax should be borne by

the personal property, and the widow not entitled to any portion of such until the tax was paid. The trial court adjudged that the tax, payable before distribution, should be deducted from the entire estate, the widow to pay such part as the value of all the property by law allotted to her bore to the entire estate. In affirming the lower court we said:

> "In view of the inequality that would result, we are reluctant to adopt the view that the estate tax is a charge on the personal estate, unless compelled to do so by the act itself. We do not regard as controlling the fact that the primary duty of paying the tax is imposed upon the executor, in view of the fact that the executor may be 'any person who takes possession of any property of decedent,' and the further consideration that the obligation of the personal representative to pay the tax is a mere rule of administration, to insure its payment, and does not in any way affect the rights of the heirs and distributees as among themselves."

We concluded that the federal law did not intend to discriminate between the widow, heirs and distributees, but that all the *taxable* estate should bear its proportionate part, subject to the right of a decedent to otherwise provide by will. We held that the estate tax, under our law, could not be regarded as a debt within the meaning of our statute. *Martin* v. *Martin's Admr., supra,* presented a similar question, whether or not the federal estate tax should be borne equally by the beneficiaries as between themselves, regardless of the character of property received from the estate, or whether the tax should be borne exclusively by the personalty left by the decedent, "thus discriminating against and reducing the amount which the distributees of the latter class of property (real estate) would receive under our statute of descent and distribution."

Martin had died intestate, the owner of real and personal property upon which the estate tax was around $19,000. The value of the real property greatly exceeded that of the personalty. The trial court held that the tax should be

borne equally by those to whom the personal property would go, and those taking the real property, in the proportion of the value thereof received by each. The court pointed out that it was urged to reverse the *Hampton* case because of its claimed unsoundness. This we refused to do, digesting numerous cases relied upon by appellant, finding them to be cases where the decedent died testate, and wherein the "inference was drawn by the courts dealing with the question that he had a right to direct in his will how the federal burden should be distributed, and not having done so, it would be presumed that he intended for the personalty * * * to bear the burden of the tax * * * which as we have said operate to the detriment of the legatees to whom he had given the personal property, and relieve his devisees to whom he gave his real estate."

We further said: "Moreover, a number of those cases do not deal with the question we have here, except insofar as they attempt to define the nature of the federal demand, which those opinions conclude is an estate tax, collectible by the government from every class of property of the decedent, whether in the hands of the immediate takers, or transferees for a period of ten years after the death of decedent, but with the provision that for the convenience of administration the personal representative * * * must pay the exacted amount to the federal government, and which it was possibly contemplated would be paid out of the personalty, if there was enough of it before any distribution * * *."

We cited Bingham's Admr. v. Com., 196 Ky. 318, 244 S. W. 781, finding that while disputed question arose in a different manner, the court had approved the doctrine in the *Hampton* case. We closed by saying, "We conclude that in the absence of specific direction to the contrary, justice requires that all classes of beneficiaries participating in the net value of the estate, left after the payment of federal tax is satisfied and deducted, should, as between themselves, bear the just proportion of it."

Counsel for appellees rely on Lakes v. Lakes Exor., 267 Ky. 684, 103 S. E. (2) 86. This case like others we have observed (save perhaps the *Burrow* case) does not involve

the precise question here. Mr. Lakes died testate; on the day he wrote his will he executed deeds to several of his children, they to be effective upon his death. To three others he devised $9,000 each, the residue to be divided among all the children. The executors paid in part the three cash bequests. Payment of the balance had been delayed and the three who had been bequeathed cash filed suit for the balance, asking also for declaration as to whether or not they should be charged with any part of the federal estate tax. The lower court held that none of the three should be so charged, and the executor cross appealed from that portion of the judgment.

While the opinion does not show the fact, we have examined the record and find that the children to whom testator had conveyed real estate, were not parties to the suit, or if so did not raise the question as to payment of estate taxes on gifts, undoubtedly of testamentary character. The Lakes' will made no mention of taxes, though he directed payment of his debts. There was certain language in testator's will, as we found, to indicate that it was his desire to have the three beneficiaries receive the exact amounts of cash bequeathed. By thus concluding the effect was to place the burden of federal estate taxes on the residue of the estate, hence there was no necessity for the holding that the estate tax is a tax against the estate, not to be charged against those who received cash bequests. This ruling in our opinion ran counter to the principles announced in the Hampton and Martin opinions.

There may arise many cases, as seems to be the case here, where the personal representative is without funds to pay the heavy estate taxes upon the estate created by the revenue law. The inclusion in such gross tax estate of the value of property passing under power of appointment, or gifts in contemplation of death, would frequently create that situation. The personal representative who has paid, or is to pay the tax out of the true estate, should have the right of subrogation to the position of the sovereign which has received its tax, and to collect from those against whom the tax might have been, under certain circumstances, enforced under the provisions of the federal law had not the tax been promptly paid, or later paid as a debt against

the residue. Aside from these observations, we adhere to our conclusions in the Hampton and Martin opinions to the extent they hold that the federal estate tax is not a tax against the estate, save and except that it must be paid therefrom, for the benefit and convenience of the taxing authorities. It follows that the judgment of the trial court is affirmed.

The whole court sitting. Chief Justice Fulton concurs in so much of the opinion as holds that the will did not manifest an intention on the part of testator as to the final burden of estate taxes. Judges Rees and Cammack dissent because they are of the opinion that the will manifests an intention on the part of the testator that the trusts should bear the estate taxes. All three dissent from that portion of the opinion which holds that the estate tax is not to be paid from the residue, or the trust estate.

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IM.

EXHIBIT "C".

Provisions of James Hatcher's Will Relative to Taxes.

The provisions of James Hatcher's will relative to taxes, and in issue in this suit, are:

> "Item 1. I direct the trustees hereinafter named to pay all my just debts out of the trust funds coming into their hands as soon after my death as practicable." * * *
>
> "I hereby further authorize and empower my trustees when necessary to borrow money and to mortgage my trust estate therefor for the sole purpose of paying

any United States Government, County and State, including income and inheritance, taxes levied or assessed against my said estate left by me by this will." • • •

"I hereby further authorize, empower and direct that out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes on property deeded by me to the Trimble children and Hatcher children on Ivy and Caney Creeks, and this shall continue throughout the existence of the ten year trust only. The taxes mentioned in this paragraph shall be paid without charging any of the trust property." • • •

"The trustees shall at least twice a year for the first ten year period; on the first day of January and on the first day of July each year; after having paid all expenses, taxes, repairs and allowances as herein provided for;" • • •

"It is my express will and desire that when and if the income of my trust estate, after the expiration and settlement of the first trust of ten years, ever becomes insufficient to pay the taxes and the actual and necessary expenses and upkeep of the trust estate and the trustees for and during the second or thirty-five years trust period and at the same time leave a substantial and sufficient sum out of which to pay the devisees a fair and equitable distribution of the remaining proceeds after the payment of such taxes, expenses and upkeep of the trust fund and trust estate, that then and in that event, the beneficiaries, of whatever number they may be who are entitled to more than one-half of the benefits under and by virtue of my said last will and testament, may petition my trustee for a discontinuance of the second or thirty-five years trust relationship under my said will;" • • •

"3. In the last paragraph at the bottom of page 12 of my said will I have provided for the payment of taxes "on all of the property which I may own at the time of my death, whether the same be a part of this

trust estate or not, also to pay all taxes on property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, etc. I hereby revoke the whole of said paragraph at the bottom of page 12 of my said will and in lieu thereof I make the following provisions in the next succeeding paragraph for the payment of taxes:

"I hereby further authorize, empower and direct that out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death, whether the same be part of this trust estate or not, also to pay all taxes on that property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, alone, when and if there are sufficient funds in my general trust fund with which to make such payment of said taxes. But when and if there is no money available out of my general trust fund for such payment, then I hereby authorize and empower my trustees to make such payment of such taxes for the Ivy and Caney tracts out of the separate trust estate or separate trust funds held by my trustees for my devisees as set forth on page 15 of my said will. If such payment is made out of my general trust fund such payment shall be charged against the devisee or devisees for whom such payment was made. And if no funds are available out of either of my general trust fund or out of the separate trust funds held by my trustees for the devisees then such payment or any balance on said taxes shall be made by each devisee or devisees who owe such taxes." * * *